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Nos. 87-578 and 87-602

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In the Supreme Court of the United States

OCTOBER TERM, 1987

THE BANK OF NOVA SCOTIA, PETITIONER

v.

UNITED STATES OF AMERICA

WILLIAM A. KILPATRICK, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether a district court may dismiss an indictment for misconduct in the course of a grand jury investigation, where the misconduct has not prejudiced the defendants.

PARTIES TO THE PROCEEDINGS

In addition to the parties named in the caption, the following individuals were appellees in the court of appeals and are petitioners here: Declan J. O'Donnell and Sheila C. Lerner. Michael Alberga and C.S. Gill were also appellees in the court of appeals but are not petitioners here.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A41)[1] is reported at 821 F.2d 1456. The opinions of the district court (Pet. App. C1-C55, D1-D35) are reported at 594 F. Supp. 1324 and 575 F. Supp. 325.

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[1] "Pet. App." refers to the appendix to the petition in No. 87-578; "K. Tr." refers to the transcript of the hearing before Judge Kane; "W. Tr." refers to the transcript of the hearing before Judge Winner.

JURISDICTION

The judgment of the court of appeals was entered on June 18, 1987. Petitions for rehearing were denied on August 19, 1987 (Pet. App. B1-B3). The petition for a writ of certiorari in No. 87-578 was filed on October 9, 1987, and the petition in No. 87-602 was filed on October 13, 1987. Both petitions were granted on January 11, 1988, limited to Question One presented by each petition. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE AND RULES INVOLVED

28 U.S.C. 2111 and Rules 6(d), 6(e), and 52(a) of the Federal Rules of Criminal Procedure are set out in an appendix to this brief.

STATEMENT

1. This case stems from a 20-month investigation conducted by two successive grand juries. Two attorneys from the Tax Division of the Department of Justice assisted the grand juries. The attorneys, in turn, were assisted by personnel from the Internal Revenue Service (IRS). In September 1982, a 27-count indictment was returned charging petitioners and others (in various combinations) with conspiracy, in violation of 18 U.S.C. 371; willfully aiding and assisting in the preparation and presentation of false tax returns, in violation of 26 U.S.C. 7206(2); willfully making and subscribing false individual tax returns, in violation of 26 U.S.C. 7206(1); mail fraud, in violation of 18 U.S.C. 1341; and obstruction of justice, in violation of 18 U.S.C. 1503.

The district court initially dismissed all but one of the counts for failure to state an offense. Petitioner Kilpatrick went to trial and was convicted on the one remaining

count (obstruction of justice). The government appealed the dismissal of the other 26 counts. Before argument, the court of appeals granted a defense motion to remand the case to the district court for the purpose of determining whether prosecutorial misconduct during the grand jury proceedings constituted another basis for dismissal. On remand, the district judge granted a new trial to petitioner Kilpatrick on the obstruction of justice count and ordered disclosure of the grand jury transcripts. Because he was retiring from the bench, that district judge did not decide whether the indictment should be dismissed for prosecutorial misconduct; instead, the cases were reassigned to another judge. Pet. App. A2 & n.2, D26-D33.

The newly assigned judge, after conducting a hearing, dismissed all 27 counts of the indictment (Pet. App. A2, C54-C55). The court held that the government had violated Fed. R. Crim. P. 6(e) by disclosing grand jury materials to IRS employees having civil tax enforcement responsibilities (Pet. App. C37-C40), by failing to provide prompt notice to the court of disclosures of grand jury materials (*id.* at C38), by disclosing to potential witnesses the names of targets of the investigation (*id.* at C40-C41), and by instructing two grand jury witnesses that they were not to reveal the fact that they had testified before the grand jury or the substance of their testimony (*id.* at C41). In addition, the court held that the government had violated Fed. R. Crim. P. 6(d) because IRS agents made joint appearances before the grand jury for the purpose of reading transcripts to the jurors (Pet. App. C7-C8, C35-C36).

The court also found that the prosecutors engaged in other forms of improper conduct in the course of the grand jury investigation. The court found that one of the prosecutors was guilty of misconduct when he argued with an expert witness, during a grand jury recess, after the witness had given testimony favorable to the defense (Pet.

App. C33-C34). In addition, the court held that the government violated the witness immunity statute (18 U.S.C. 6002, 6003) by the use of "pocket immunity" or "letters of assurance" (Pet. App. C44-C46). The court also found that the government presented "questionable hearsay" to the grand jury (*id.* at C47), that it improperly called several witnesses for the sole purpose of having them assert their privilege against compelled self-incrimination (*id.* at C46-C47), and that it violated the Sixth Amendment by conducting post-indictment interviews of several high-level employees of the Bank of Nova Scotia without notifying counsel for the Bank (*id.* at C47-C49). The court also found that the independence of the grand jury was compromised because IRS agents were sworn as "agent[s] of the grand jury" (*id.* at C3-C8), and it found that one of the agents gave an inaccurate summary of evidence obtained from other witnesses (*id.* at C25-C30).

The district court held that the indictment should be dismissed because of the Rule 6(d) and (e) violations and because of the "totality of the circumstances" surrounding the grand jury investigation (Pet. App. C54-C55). The court found that the conduct of the government was prejudicial to the defendants because the grand jury "was converted into little more than a rubber stamp" (*id.* at C53-C54). In addition, the court found that, wholly apart from any prejudice, dismissal was appropriate as an exercise of the court's "supervisory authority" (*id.* at C53).

2. The court of appeals reversed the order of dismissal and remanded the case with directions to reinstate all the counts of the indictment (Pet. App. A1-A33). After first concluding that the indictment was legally sufficient (*id.* at A3-A11), the court of appeals reviewed in detail the various grand jury violations found by the district court. The court stated that, based on its review of the record, it was "not persuaded by the several reasons given for the

dismissal" (*id.* at A21). The court noted that the use of summaries of evidence is "permissible and often helpful, especially in complicated cases such as this" (*ibid.*); it stated that the use of "informal immunity" was "entirely proper" and that, in any event, "the defendants have failed to show how the use of informal immunity prejudiced the grand jury" (*id.* at A22 (footnote and citation omitted)); and it held that the government's post-indictment questioning of bank employees "could not possibly have affected the grand jury's charging decision" (*ibid.*). The court also held that the presence of more than one IRS agent in the grand jury room for the purpose of reading transcripts, while it violated Rule 6(d), did not warrant dismissal of the indictment because it did not prejudice the defendants (Pet. App. A22-A23).[2]

In addition, the court of appeals found no support for the district court's conclusion that government attorneys " 'relinquished to the IRS their responsibility to determine the persons to whom disclosure would be made' " (Pet. App. A23 (quoting district court opinion)) or its conclusion that IRS agents "manipulated the grand jury" in order to "obtain materials for [use in] civil litigation" (*ibid.*). The court also noted that, "[a]ssuming that [the] allegation" of improper disclosure of grand jury materials to civil IRS agents "finds support in the record," the grand jury's independence was not "usurped in such a significant way as to amount to grand jury abuse" (*id.* at A24 (citation omitted)). In addition, the court observed that "[t]he aid of IRS experts was essential to a complete understanding of the case" and that "[t]he fact that some of the IRS personnel assigned to the grand jury investigation were from

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[2] The court acknowledged the district court's finding that IRS agents had convened grand jury sessions without government attorneys being present, but it held that the finding on that issue was "not supported by the record" (Pet. App. A23 n.14).

the civil division is by itself not sufficient to show grand jury abuse" (*ibid.*). The court cited the grand jury's return of a multi-count indictment as "probative evidence that it was not abused to obtain evidence for civil purposes" (*id.* at A25 (footnote omitted)).

The court of appeals also held that the grand jury's independent judgment was not impaired by the disclosure of the identity of the targets of the investigation to various potential witnesses or by the unauthorized instructions of secrecy that were given to two witnesses at the time they testified before the grand jury (Pet. App. A25). Regarding the term "agents of the grand jury" that was applied to certain IRS agents, the court – without deciding whether the use of that term was improper – found that its use did not prejudice the defendants (*id.* at A25-A26). Similarly, the court found dismissal of the indictment was not justified on the ground that several witnesses who intended to invoke the privilege against compelled self-incrimination were called before the grand jury. The court noted that the witnesses' expression of an intention to invoke the privilege "cannot be transformed into a prohibition against inquiry" and that "[o]nce the privilege was invoked on the [r]ecord, the prosecutors discontinued all questioning" (*id.* at A26-A27 (footnote omitted)). And the court found that an incident in which one of the prosecutors engaged in an argument with an expert witness during a grand jury recess, while unjustifiable, did not affect the grand jury's independence (*id.* at A27).

The court noted that a "presumption of regularity • • • attaches to grand jury proceedings" (Pet. App. A27 (citation omitted)), and it found that petitioners had failed to overcome that presumption. It observed that the grand jury transcripts revealed "an active, independent, and questioning grand jury, familiar with the record, one that thoughtfully questioned, rather than submitted to statements and suggestions of the Government attorneys" (*id.*

at A27-A28 & n.20 (citing numerous examples)). In addition, the court pointed out that, as reflected in the grand jury transcripts, "the prosecutors frequently reminded the grand jury of its independence and duty to make its own assessment of the evidence introduced before it" (*ibid.* (quoting examples)). The court noted that "[t]he district court erred in focusing primarily on the propriety of the Government's conduct rather than on possible interference with the integrity and independence of the grand jury" (*id.* at A27-A28).

Finally, the court of appeals held that "the drastic remedy of dismissal of an indictment, whether premised on due process or supervisory powers theories," could not be ordered in the absence of a "significant infringement on the grand jury's ability to exercise independent judgment" (Pet. App. A32 (footnote omitted)). The court noted that, in *United States* v. *Hasting*, 461 U.S. 499, 509 (1983), this Court made clear that "errors that are harmless, including most constitutional violations," must be ignored (Pet. App. A32 (footnote omitted); see also *id.* at A32 & n.23).

Judge Seymour dissented (Pet. App. A34-A41). In her view, a showing of prejudice to the defense is not required in order for a court to dismiss an indictment on the basis of its supervisory powers (*id.* at A36-A40). She concluded that on the facts of this case, "the district court was within its discretion in exercising its supervisory power to protect the integrity of the judicial process and to deter illegal conduct" (*id.* at A40-A41 (citing *Hasting*, 461 U.S. at 505)).

SUMMARY OF ARGUMENT

1. The issue in this case is whether a district court may dismiss an indictment, in the exercise of its supervisory powers, for alleged grand jury abuse that has not affected the grand jury's charging decision. This question must be

answered in the negative for several reasons. First, dismissal of an indictment in the absence of prejudice would violate the rule that "[a]n indictment returned by a legally constituted and unbiased grand jury, • • • if valid on its face, is enough to call for a trial on the merits." *Costello* v. *United States*, 350 U.S. 359, 363 (1956). Second, under 28 U.S.C. 2111 and Fed. R. Crim. P. 52(a), federal courts are required to disregard errors that do not affect substantial rights. A court cannot ignore those provisions simply by invoking its supervisory authority. Third, this Court has made clear in a variety of contexts that errors that are nonprejudicial—even constitutional errors—do not warrant dismissal of an indictment or reversal of a conviction. See, *e.g.*, *United States* v. *Hasting*, 461 U.S. 499 (1983); *United States* v. *Morrison*, 449 U.S. 361 (1981). The principles established in those cases are fully applicable here, since the errors in this case, for the most part, are simply procedural violations of Fed. R. Crim. P. 6(d) and (e). Finally, a rule authorizing dismissal of an indictment in the absence of prejudice would be unsound as a policy matter. Such a rule would exact substantial costs, particularly when the indictment stems from a lengthy and complex investigation. The objective of deterring governmental misconduct can be achieved as effectively, if not more so, in other less drastic ways, such as by disciplining the prosecutors who engaged in the misconduct. Furthermore, absent a requirement of prejudice, the courts would lack concrete standards to apply in deciding whether to dismiss an indictment. The result of adopting petitioners' position would be to provoke pretrial litigation and produce disparate, ad hoc judgments among courts as to when to dismiss indictments because of grand jury abuse. In short, there is no sound legal or policy basis to justify dismissing an indictment where the defendant has not been prejudiced.

2. Even if dismissal of an indictment were appropriate in the absence of prejudice, dismissal would not be warranted here. To begin with, there is no evidence that the misconduct found in this case is symptomatic of a longstanding problem involving other prosecutors and other cases. Thus, the exercise of supervisory authority is not necessary to deter widespread abuse. Moreover, apart from the isolated errors that were committed, the record shows that the prosecutors in this case acted fairly and professionally. The record further shows that the grand jury was active and inquisitive, and that it retained its independent role throughout the investigation. Finally, as we demonstrate below, petitioners greatly exaggerate the seriousness of the alleged errors. In some instances the claims of error involve conduct that is entirely lawful. In the other instances, the errors constitute at worst oversights or exercises of poor judgment by the prosecutors, rather than deliberate efforts to undermine the integrity of the grand jury. In the context of a 20-month investigation, those errors do not warrant the extreme sanction of dismissal of the indictment.

ARGUMENT

I. AN INDICTMENT MAY NOT BE DISMISSED FOR GRAND JURY ABUSE IN THE ABSENCE OF PREJUDICE TO THE DEFENDANT

A. A Facially Valid Indictment Is Ordinarily Immune From Challenge Based On Alleged Defects In The Grand Jury Process

In *Costello* v. *United States*, 350 U.S. 359, 363 (1956), this Court stated that "[a]n indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for a trial on the merits." See also *United States* v. *Calandra*, 414 U.S. 338, 344-345 (1974); *Lawn* v. *United States*, 355 U.S. 339, 349 (1958); *Beavers* v. *Henkel*, 194 U.S. 73, 84-85 (1904); *Bracy* v. *United States*, 435 U.S.

1301, 1303 (1978) (Rehnquist, Circuit Justice). The Court in *Costello* held that the Grand Jury Clause of the Fifth Amendment does not require that a defendant be permitted to challenge an indictment on the ground that the evidence before the grand jury was inadequate or incompetent. In addition, the Court refused to invoke its supervisory powers to dismiss the indictment on that ground. To accept such arguments, the Court held, would "run counter to the whole history of the grand jury institution, in which laymen conduct their inquiries unfettered by technical rules" (350 U.S. at 364).

The *Costello* rule reflects two fundamental considerations. The first is that the grand jury plays a discrete and limited role in the criminal justice system. A grand jury investigation is simply a preliminary step in the prosecution process, a screening mechanism to determine whether there is a sufficient basis to require the suspect to stand trial before a petit jury. See *Calandra*, 414 U.S. at 343-344, 349.

In contrast to a criminal trial, with its array of procedural and evidentiary safeguards, a grand jury investigation is a much less formal proceeding, and it is not patterned on the traditional adversary process. The grand jury conducts its investigation ex parte and receives evidence only from the prosecutor; neither the suspect nor his attorney is entitled to appear before the grand jury to testify or present evidence, to cross-examine witnesses, or otherwise to rebut the prosecutor's presentation. See *Calandra*, 414 U.S. at 343-344. The rules of evidence do not apply, and the grand jury is free to consider hearsay or other incompetent evidence as well as evidence that was illegally obtained. *Id.* at 345; *Costello*, 350 U.S. at 363. The standard governing the grand jury's deliberations is probable cause, not proof beyond a reasonable doubt, and an indictment may be returned if a bare majority of the grand jurors concur. See Fed. R. Crim. P. 6(a), (b)(2), (f). Thus,

in addition to its role as an investigative body, the grand jury serves as a flexible and informal device to screen out, at the beginning of the criminal process, those cases in which further proceedings are unwarranted. The informality and limited role of the grand jury in addressing the question of guilt distinguishes the grand jury process sharply from the trial before the petit jury, at which the issue of guilt or innocence is decided.

The second factor underlying the *Costello* rule is the recognition that, in light of the nature and function of the grand jury, it would impose significant and unjustified costs on the criminal justice system to subject indictments to searching pretrial scrutiny and allow them to be dismissed for procedural irregularity. Litigation over issues of grand jury irregularities would entail a substantial expenditure of prosecutorial and judicial resources and would impede the prompt adjudication of the central question in the case—the defendant's guilt or innocence. See *Costello*, 350 U.S. at 363. And to dismiss a prosecution and require that the government seek a new indictment not only entails delay, but in complex cases such as this one it can result in a costly and onerous process of representing a large quantity of evidence to a new grand jury.

Because the Court in *Costello* had before it only the question whether hearsay evidence alone could support a grand jury indictment, the Court did not have to address the question whether an indictment could ever be dismissed for flagrant abuses that so distorted the grand jury's role that the defendant was in effect deprived of his Fifth Amendment right to be indicted by a grand jury. At the least, however, *Costello* sets the framework for that inquiry. It makes clear that if dismissal of an indictment for grand jury abuse is ever appropriate, it cannot be based on mere technical errors or errors involving evidentiary insufficiency. It must be based on conduct that so thoroughly

distorts the grand jury process as to make it clear that the grand jury has failed to perform its constitutional role. Thus, under the principles of *Costello*, dismissal of an indictment cannot be ordered in the absence of a clear showing of prejudice to the defendants.

B. Dismissal Of An Indictment In The Absence Of Prejudice Would Conflict With 28 U.S.C. 2111 and Fed. R. Crim. P. 52(a)

Petitioners argue that the district court was entitled to dismiss the indictment in this case in the exercise of its supervisory power and that the court of appeals should have affirmed the dismissal order on that ground. To be sure, federal courts are authorized, within limits, to "formulate procedural rules not specifically required by the Constitution or the Congress." *United States* v. *Hasting*, 461 U.S. 499, 505 (1983). A court's invocation of its supervisory power, however, is subject to important limitations. One of the most significant is that a court may not devise a rule in the exercise of its supervisory authority if that rule would conflict with some other binding provision of law. As this Court recently stated, "[e]ven a sensible and efficient use of the supervisory power * * * is invalid if it conflicts with constitutional or statutory provisions." *Thomas* v. *Arn*, 474 U.S. 140, 148 (1985). Accord *Palermo* v. *United States*, 360 U.S. 343, 353 n.11 (1959) ("The power of this Court to prescribe rules of procedure and evidence for the federal courts exists only in the absence of a relevant Act of Congress."); *United States* v. *National City Lines, Inc.*, 334 U.S. 573, 589 (1948) ("[O]ur general power to supervise the administration of justice in the federal courts * * * does not extend to disregarding a validly enacted and applicable statute or permitting departure from it."). The principle that federal courts, acting pursuant to their supervisory powers, may not override congressional policies is obviously a sound one. A contrary principle " 'would confer on the judiciary discretionary power to disregard the considered limitations of the law it is charged with enforcing.' " *Thomas*, 474 U.S. at 148 (quoting *United States* v. *Payner*, 447 U.S. 727, 737 (1980)).

Permitting a district court to dismiss an indictment in the absence of prejudice—or an appellate court to affirm such a dismissal—would be inconsistent with 28 U.S.C. 2111 and Fed. R. Crim. P. 52(a). Section 2111 provides that an appellate court "shall give judgment * * * without regard to errors or defects which do not affect the substantial rights of the parties." Rule 52(a) provides that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." Both provisions reflect Congress's judgment that prejudice is an essential prerequisite to granting relief in a criminal case.[3]

[3] Although Rule 52(a) is a court rule and has never formally been enacted by Congress, it is clear that Congress intended for that rule to govern harmless error questions and that the rule states congressional policy regarding the principles of harmless error. See *United States* v. *Lane*, 474 U.S. 438, 454-455 (1986)] (Brennan, J., concurring in part and dissenting in part). Rule 52(a) was designed to take the place of two statutory provisions, 18 U.S.C. (1946 ed.) 556 and 28 U.S.C. (1946 ed.) 391. When Congress revised both the Criminal Code and the Judicial Code several years later, it relied on Rule 52(a) as the reason for repealing the two predecessor statutes so as to avoid redundancy. See H.R. Rep. 304, 80th Cong., 1st Sess. 8 (1947) ("effect was given to the changes [made by the Federal Rules of Criminal Procedure] by revising modified sections and repealing superseded provisions"); H.R. Rep. 308, 80th Cong., 1st Sess. A236 (1947) (former Section 391 is "superseded by Rule 61 of said Civil Rules, and Rule 52 of said Criminal Rules"). The following year, Congress enacted 28 U.S.C. 2111 to ensure that the harmless error provisions applicable to the district courts through the Civil and Criminal Rules would be applicable to appellate courts as well. See H.R. Rep. 352, 81st Cong., 1st Sess. 18 (1949).

As this Court has made clear, 28 U.S.C. 2111 and Rule 52(a) apply not only to errors occurring at trial, but also to errors occurring before the grand jury. Thus, in *United States* v. *Mechanik*, 475 U.S. 66, 71-72 (1986), the Court stated that "[w]e see no reason not to apply [Rule 52(a)] to 'errors, defects, irregularities, or variances' occurring before a grand jury just as we have applied it to such error occurring in the criminal trial itself." The Court held that the defendant's conviction at trial rendered harmless the violation of Fed. R. Crim. P. 6(d) that occurred in that case (475 U.S. at 72-73). In her concurring opinion in *Mechanik*, Justice O'Connor, joined by Justices Brennan and Blackmun, expressed complete agreement with the majority's ruling that Rule 52(a) applies to violations of Rule 6.[4] In reaching that conclusion, Justice O'Connor reviewed the history of Rule 52(a). She noted (475 U.S. at 75) that "[t]he Advisory Committee's notes to Rule 52(a) state that '[t]his rule is a restatement of existing law,' which specifically provided for a harmless error analysis of objections going to the validity of the indictment in 18 U.S.C. § 556 (1946 ed.)." She further pointed out (475 U.S. at 75) that "[t]he language of Rule 6 does not exempt the Rule from a harmless error scrutiny" and that, to the contrary, the commentary to Rule 6 expressly confirms "the rulemakers' intent that violations of Rule 6(d) would be among those errors subject to harmless error review."

Petitioners appear to recognize that a court may not exercise its supervisory power if to do so would violate Congress's intent. Thus, the Bank of Nova Scotia asserts that

[4] Justice O'Connor's disagreement with the majority was over whether the Rule 52(a) inquiry should focus on the petit jurors' verdict or on the grand jury's charging decision. In her view, the focus should be on the grand jury's charging decision, regardless of whether there has been a conviction (475 U.S. at 76).

"[t]here is no doubt that Congress intended that the dismissal sanction be employed in appropriate situations for misconduct before the grand jury" (Br. 37 n. 28). See also *id.* at 36 (noting that "[d]ismissal implements the essential rules established by Congress and this Court for the administration of proceedings before federal grand juries"). Yet neither petitioners nor amici explain how the position they urge—*i.e.*, that dismissal of an indictment is appropriate even in the absence of prejudice (Kilpatrick Br. 7-26; Bank Br. 30-42; ACLU Br. 5-35; NACDL Br. 6-27)—can be reconciled with 28 U.S.C. 2111 and Rule 52(a).

At bottom, petitioners' argument consists of reasons why, in their view, requiring proof of prejudice in connection with grand jury misconduct would be unwise as a matter of policy. While we disagree with petitioners' analysis of the policy issues (see pages 22-26, *infra*), the flaw in their argument is that, as 28 U.S.C. 2111 and Rule 52(a) demonstrate, Congress and this Court have already weighed those policy considerations and have decided that errors that have not prejudiced a defendant should not provide a basis for dismissing an indictment. See generally *United States* v. *Widgery*, 778 F.2d 325, 329 (7th Cir. 1985). A court—whether acting pursuant to its supervisory authority or otherwise—has no authority to disregard that determination.

C. This Court's Decisions Compel The Conclusion That An Indictment May Not Be Dismissed For Procedural Irregularities In The Grand Jury In The Absence Of Prejudice

Wholly apart from 28 U.S.C. 2111 and Fed. R. Crim. P. 52(a), this case is controlled by numerous decisions of this Court holding that nonprejudicial errors must be disregarded. Those decisions, several of which require a harmless error analysis even of constitutional violations, cannot be meaningfully distinguished from the present case.

For example, in *United States* v. *Morrison*, 449 U.S. 361 (1981), the Court held that an indictment should not be dismissed because of a violation of the Sixth Amendment right to counsel that did not result in prejudice to the defendant. In *Morrison*, the court of appeals set aside the defendant's conviction and dismissed the indictment, without any showing of prejudice, because government agents had intentionally sought to undermine the defendant's relationship with her attorney. This Court reversed, holding that because the violation had no effect on the criminal proceedings, the remedy fashioned by the lower court was inappropriate. The Court reasoned that "[t]he remedy in the criminal proceeding is limited to denying the prosecution the fruits of its transgression" (*id.* at 366). According to the Court, "absent demonstrable prejudice, or substantial threat thereof, dismissal of the indictment is plainly inappropriate, even though the violation may have been deliberate" (*id.* at 365 (footnote omitted)). The Court further noted (*id.* at 365-366) that the requirement of prejudice applies not only in the Sixth Amendment context, but also in the Fourth and Fifth Amendment contexts.[5]

In *United States* v. *Hasting, supra*, the Court held that a court may not use its supervisory power to reverse a conviction based on a prosecutor's improper comment on the

[5] The dissenting judge below stated that this Court in *Morrison* indicated that "a showing of prejudice is not required when the record reveals 'a pattern of recurring violations' " (Pet. App. A40 (quoting 449 U.S. at 366 n.2)). In fact, the Court left that issue open; it simply noted that "the record before us does not reveal a pattern of recurring violations by investigative officers that *might* warrant the imposition of a more extreme remedy in order to deter further lawlessness" (*ibid.* (emphasis added)). In any event, that language strongly suggests that, if dismissal is ever warranted in the absence of prejudice, there must be a history of misconduct, not simply isolated violations in a single case. As discussed on pages 26-27, *infra*, under that standard, dismissal is inappropriate in the present case.

defendant's failure to testify if the error is harmless. The Court noted (461 U.S. at 506) that "[s]upervisory power to reverse a conviction is not needed as a remedy when the error to which it is addressed is harmless since, by definition, the conviction would have been obtained notwithstanding the asserted error." The Court stressed that it "has consistently made clear that it is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations" (*id.* at 509). In addition, the Court observed that "deterrence is an inappropriate basis for reversal" where the prosecutor's violation is "attenuated" and "where means more narrowly tailored to deter objectionable prosecutorial conduct are available," such as disciplinary proceedings or "publicly chastis[ing] the prosecutor by identifying him in [a judicial] opinion" (*id.* at 506 & n.5).[6]

[6] This Court has held numerous other errors to be subject to harmless error analysis. See, *e.g.*, *Pope* v. *Illinois*, No. 85-1973 (May 4, 1987), slip op. 4-7 (erroneous jury instruction); *Rose* v. *Clark*, 478 U.S. 570 (1986) (same); *Delaware* v. *Van Arsdall*, 475 U.S. 673, 681-684 (1986) (violation of Confrontation Clause); *United States* v. *Lane*, *supra* (misjoinder under Fed. R. Crim. P. 8(b)); *Rushen* v. *Spain*, 464 U.S. 114, 117-120 (1983) (right to be present at trial); *Moore* v. *Illinois*, 434 U.S. 220, 222 (1977) (admission of identification obtained in violation of right to counsel); *Milton* v. *Wainwright*, 407 U.S. 371, 372-373 (1972) (admission of confession in violation of the Sixth Amendment); *Chambers* v. *Maroney*, 399 U.S. 42, 52-53 (1970) (admission of evidence obtained in violation of the Fourth Amendment); *Coleman* v. *Alabama*, 399 U.S. 1, 10-11 (1970) (denial of right to counsel at a preliminary hearing); *Harrington* v. *California*, 395 U.S. 250, 254 (1969) (improper admission of statement of nontestifying co-defendant); *Chapman* v. *California*, 386 U.S. 18 (1967) (comments and instructions on a defendant's silence); cf. *United States* v. *Bagley*, 473 U.S. 667, 681-684 (1985) (opinion of Blackmun, J.), and *id.* at 685 (White, J., concurring in part and dissenting in part) (failure to disclose exculpatory material is reversible error only if there is reasonable probability that the material would have affected the outcome of the trial); *Strickland* v. *Washington*, 466 U.S. 668, 694 (1984) (to prevail on a claim of ineffective assistance of

To be sure, this Court has dispensed with harmless error analysis in the case of certain types of errors, but those situations are plainly "the exception and not the rule." *Rose* v. *Clark*, 478 U.S. at 578. Recent decisions of this Court leave no doubt that courts must apply the harmless error doctrine where an error, even a constitutional one, is susceptible to meaningful harmless error analysis, does not necessarily render the factfinding process fundamentally unfair, and does not involve a right that protects fundamental values unrelated to the factfinding process. See *id.* at 576-579; compare *Young* v. *United States ex rel. Vuitton et Fils S.A.*, No. 85-1329 (May 26, 1987), slip op. 21-26 (plurality opinion) (appointment of interested prosecutor raised doubt that prosecution could be conducted in disinterested manner, created appearance of impropriety to which harmless error analysis would not have been sensitive, and did not lend itself to ready assessment of its effects on the prosecution); *Vasquez* v. *Hillery*, 474 U.S. 254, 260-264 (1986) (racial discrimination in selection of grand jurors struck at fundamental values of judicial system and society, and was not susceptible to evaluation of resulting harm); see generally *Chapman*, 386 U.S. 18, 23 & n.8 (1967). Exceptions to the harmless error rule are rare and must be based on extraordinary circumstances. As this Court recently stated, "if the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that *any* other errors that may have

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counsel, a defendant must show reasonable probability that, but for counsel's errors, the result of the proceeding would have been different); *United States* v. *Valenzuela-Bernal*, 458 U.S. 858, 873-874 (1982) (showing of prejudice required where the government deported potential witnesses before they could testify for the defendant); *Weatherford* v. *Bursey*, 429 U.S. 545, 554-557 (1977) (defendant's right to counsel not infringed where attorney-client information obtained by government informant had no effect on trial).

occurred are subject to harmless error analysis" (*Rose* v. *Clark*, 478 U.S. at 579 (emphasis added)).

The conduct at issue here plainly falls within the general rule requiring a harmless error evaluation. There is simply no reason why the alleged misconduct here—procedural violations, primarily of Fed. R. Crim. P. 6—should be given a preferred status over such errors as improper comments on a defendant's silence, erroneous jury instructions, violations of the Confrontation Clause, admission of evidence in violation of the Fourth Amendment, misjoinder, or the myriad other errors that this Court has held to be subject to harmless error analysis (see note 6, *supra*). The errors involved in this case are in no way comparable to the limited class of errors that are not subject to harmless error analysis, such as racial discrimination in the selection of grand jurors or the complete denial of the right to counsel at trial. Rather, as the court of appeals recognized (Pet. App. A16-A33), the conduct at issue in this case consisted of discrete acts whose nature and potential impact were ascertainable from grand jury transcripts and testimony at the hearings in the district court. See, *e.g.*, *Mechanik*, 475 U.S. at 78-79 (O'Connor, J., concurring in judgment) (issue of whether simultaneous appearance of two witnesses in the grand jury was harmless could be resolved by reviewing pertinent grand jury transcripts).[7]

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[7] Contrary to the ACLU's contention (ACLU Br. 3 n.2), this Court in *Mechanik* did *not* leave open the question whether errors at the grand jury stage that have not prejudiced the defendant may justify dismissal of an indictment. The Court's analysis in *Mechanik* is fully consistent with the Court's many other decisions holding that a defendant is not entitled to relief for nonprejudicial errors. In *Mechanik*, the Court rejected the proposition that a violation of Rule 6(d) requires automatic reversal of a subsequent conviction and dismissal of an indictment in the absence of prejudice. While the dismissal in *Mechanik* was ordered after trial, both the majority and

Finally, unlike conduct such as racial discrimination in the selection of grand jurors, the conduct at issue in this case does not " 'strike[] at the fundamental values of our judicial system and our society as a whole' " (*Vasquez*, 474 U.S. at 262 (citation omitted)). In *Mechanik*, the Court explicitly stated that the considerations expressed in *Vasquez* "have little force outside the context of racial discrimination in the composition of the grand jury" (475 U.S. at 71 n.1). According to the Court (*ibid.*), "[n]o long line of precedent requires the setting aside of a conviction based on a rule violation in the antecedent grand jury proceedings, and the societal interest in deterring this sort of error does not rise to the level of the interest in deterring racial discrimination." In light of *Mechanik*, it is apparent that petitioners cannot overcome the "strong presumption" (*Rose* v. *Clark*, 478 U.S. at 579) that the alleged errors here are subject to harmless error inquiry.[8]

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concurring opinions suggested that, even in the pretrial setting, a showing of prejudice is required before an indictment may be dismissed. Early in its opinion, the majority "assume[d] for the sake of argument" that a violation of Rule 6(d) would have permitted the district court to dismiss portions of the indictment "*had there been actual prejudice* and had the matter been called to its attention before the commencement of the trial" (475 U.S. at 69-70 (emphasis added)). At the end of its opinion, the Court stated that it was "express[ing] no opinion as to what remedy may be appropriate for a violation of Rule 6(d) *that has affected the grand jury's charging decision* and is brought to the attention of the trial court before the commencement of trial" (475 U.S. at 72 (emphasis added; footnote omitted)). Thus, the question left open in *Mechanik* was *not* whether dismissal would be appropriate prior to trial in the absence of prejudice, but whether dismissal prior to trial is appropriate even when there *has* been prejudice. See also 475 U.S. at 75 (O'Connor, J., concurring in judgment) (recognizing that dismissal of an indictment is a "drastic remedy" that, under Fed. R. Crim. P. 52(a), is "appropriate only when a violation has impaired the substantial rights of the accused").

[8] Petitioners devote considerable attention (Kilpatrick Br. 26-45) to their claim that the court of appeals erred in finding that the alleged misconduct was not prejudicial. According to petitioners (*ibid.*), the errors in question were not harmless beyond a reasonable doubt. In the first place, however, that argument addresses the issue on which this Court did not grant certiorari (Question 2), *i.e.*, whether the court of appeals erred in holding that the errors were not prejudicial. In any event, petitioners' claim is without merit. The harmless beyond a reasonable doubt standard applies only to constitutional errors. The errors alleged in the present case, by contrast, involve primarily procedural violations of Fed. R. Crim. P. 6(d) and (e). See *Lane*, 474 U.S. at 446 n.9; compare *Chapman*, 386 U.S. at 24, with *Kotteakos* v. *United States*, 328 U.S. 750, 765 (1946).

Just as a lower court may not avoid the effect of a statute or court rule by invoking the supervisory power, it may not avoid the effect of this Court's precedents by the same device. In *United States* v. *Payner*, *supra*, the Court held that a judge may not suppress evidence in a defendant's case based on an illegal search of a third party, even when the judge bases his decision on his supervisory authority. In reaching its decision, the Court indicated that the conclusion was compelled by its cases interpreting the Fourth Amendment (447 U.S. at 731-732), and that "[t]he values assigned to the competing interests do not change because a court has elected to analyze the question under the supervisory power instead of the Fourth Amendment" (*id.* at 736). The logic of that rule is clear: if a court could dismiss an indictment or reverse a conviction for harmless error merely by invoking its supervisory authority, this Court's numerous harmless error decisions would be rendered meaningless. Such a rule, at bottom, would give lower courts "discretionary power to disregard" decisions of this Court with which they do not agree (*id.* at 737). Plainly, "the supervisory power does not extend so far" (*ibid.*); accord, *Hasting*, 461 U.S. at 506-507.[9]

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[9] The vast majority of the circuits that have addressed the issue agree that an indictment may not be dismissed for procedural irregularities in the grand jury (or other instances of governmental misconduct) in the absence of prejudice. See, *e.g.*, *United States* v.

D. Dismissal Of An Indictment For Procedural Defects In The Grand Jury Investigation That Do Not Affect The Grand Jury's Charging Decision Would Be Unsound As A Matter Of Policy

In addition to violating 28 U.S.C. 2111, Rule 52(a), the principles of *Costello*, and this Court's decisions regarding harmless error, a rule allowing the dismissal of an indictment in the absence of prejudice would be unsound as a matter of policy. An analysis of the competing policy considerations demonstrates that where the defendant has not been prejudiced, the public interest is disserved by the dismissal of an indictment.

In *Mechanik*, this Court identified a number of costs associated with the reversal of a criminal conviction: (1) it forces jurors, witnesses, courts, and the parties to expend further time, energy, and other resources to repeat the trial; (2) the loss of memory and disappearance of witnesses may make retrial more difficult, if not impossible; and (3) even if a defendant is convicted on retrial, the resulting delay undermines the goals of deterrence, rehabilitation, and the prompt administration of justice. 475

McKenzie, 678 F.2d 629, 631 (5th Cir.) (requiring a showing of prejudice "even in the case of 'egregious prosecutorial misconduct' " (citation omitted)), cert. denied, 459 U.S. 1038 (1982); *United States* v. *Nathan*, 816 F.2d 230, 234 (6th Cir. 1987); *United States* v. *Griffith*, 756 F.2d 1244, 1249 (6th Cir.), cert. denied, 474 U.S. 837 (1985); *United States* v. *Solomon*, 679 F.2d 1246, 1250-1251 (8th Cir. 1982); *United States* v. *Crow Dog*, 532 F.2d 1182, 1196-1197 (8th Cir. 1976), cert. denied, 430 U.S. 929 (1977); *United States* v. *Rogers*, 751 F.2d 1074, 1077 (9th Cir. 1985); *United States* v. *Owen*, 580 F.2d 365, 367-368 (9th Cir. 1978); *United States* v. *O'Keefe*, 825 F.2d 314, 318 (11th Cir. 1987); cf. *United States* v. *Martino*, 825 F.2d 754, 759-760 (3d Cir. 1987) (stating that, notwithstanding some of the language in earlier cases, the Third Circuit has in fact "looked to prejudice" in "every case"). Contra, *United States* v. *Jacobs*, 531 F.2d 87 (2d Cir.), vacated, 429 U.S. 909, on remand, 547 F.2d 772 (2d Cir. 1976), cert. dismissed, 436 U.S. 31 (1978); *United States* v. *Estepa*, 471 F.2d 1132 (2d Cir. 1972).

U.S. at 72. Contrary to petitioners' contention (Kilpatrick Br. 26), those costs are not avoided simply because a dismissal occurs *before* trial, particularly when the grand jury investigation is a lengthy and complex one, as was the case here. When an indictment is dismissed, the case must be presented to a new grand jury. And while some testimony from the first proceeding can be read to (or summarized for) the second grand jury, a prosecutor will often feel compelled, at least in a complex case, to let the grand jury hear from some witnesses in person, so that the grand jurors may ask questions and make credibility determinations. The presentation of the case to a new grand jury consumes the time of prosecutors, witnesses, and grand jurors. In addition, it necessarily postpones the trial, thus delaying the administration of justice and increasing the likelihood that witnesses will disappear or that their memories will fade. And if the defendant is ultimately convicted, the goals of deterrence and rehabilitation will be undermined by the delay.

In addition, a rule sanctioning the dismissal of an indictment in the absence of prejudice would almost certainly generate considerable litigation, particularly in cases involving lengthy and complex investigations. The possibility of some imperfection in a grand jury proceeding is not difficult to allege. Litigation regarding such allegations would entail a substantial expenditure of prosecutorial and judicial resources and would impede the prompt adjudication of the central question in the case – the defendant's guilt or innocence. See generally *Costello* v. *United States*, 350 U.S. at 363-364. Moreover, the absence of a requirement of prejudice would eliminate a defendant's need to explain how an alleged error was prejudicial. Hearings would thus be required not only in cases involving a likelihood of prejudice, but in many other cases as well. Cf. R. Traynor, *The Riddle of Harmless Error* 50 (1970) (footnote omitted) ("Reversal for error, regardless of its

effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it.").

Petitioners and amici claim that dismissal in the absence of prejudice is necessary to deter prosecutorial misconduct (see Kilpatrick Br. 9; Bank Br. 38; ACLU Br. 18-23; NACDL Br. 21-27). However, remedies other than dismissal of the indictment are available to ensure compliance with grand jury procedural requirements. For example, Fed. R. Crim. P. 6(e)(2) specifically states that "[a] knowing violation of Rule 6 may be punished as a contempt of court." See *United States* v. *Dozier*, 672 F.2d 531, 545 (5th Cir.), cert. denied, 459 U.S. 943 (1982). Other sanctions that a court has available in cases of proved prosecutorial misconduct include directing the prosecutor to show cause why he should not be disciplined, requesting the Department of Justice to initiate disciplinary proceedings against the prosecutor,[10] reporting the prosecutor's conduct to the disciplinary committee of the bar of which he is a member, or chastising the prosecutor in a public judicial opinion. See generally *Hasting*, 461 U.S. at 506 n.5. Because these alternatives focus on the person responsible for the improper conduct and do not impose unjustified costs on the criminal justice

[10] The Department of Justice has established procedures for investigating alleged misconduct by federal prosecutors. Department regulations establish penalties for the violation of rules governing official conduct that range in severity from an official reprimand for a single instance of minor misconduct to removal from office for serious offenses or repeated acts of misconduct. See U.S. Dep't of Justice, DOJ Order 1752.1A, *Discipline and Adverse Actions* ch. 2 & app. 1 (Apr. 27, 1981). The Attorney General has established an Office of Professional Responsibility (OPR) for the purpose of investigating allegations of unethical conduct by Department attorneys and other personnel. See 28 C.F.R. 0.39a. During 1985, the year after the dismissal of the indictment in this case, OPR completed 278 investigations of complaints involving alleged misconduct by Department of Justice employees. See OPR, *Ann. Rep. to Att'y Gen.* (1985), at 3-5; see *id.* at 6-7 (discussing specific examples).

system, they are plainly preferable to the remedy of dismissal. See generally *United States* v. *Kelly*, 543 F. Supp. 1303, 1314, supp. opinion, 550 F. Supp. 901 (D. Mass. 1982).

Where, as in this case, the errors did not affect the grand jury's charging decision, dismissal of the indictment in the absence of prejudice would be an exercise in futility. If the errors in the grand jury proceeding did not affect the first grand jury's charging decision, it logically follows that, absent some unusual circumstance, another grand jury will hand down an indictment as well.[11] In such cases, the whole process of dismissal and reindictment would accomplish very little except for delay.[12] In contrast, where prejudice *has* occurred, dismissal is more likely to have a meaningful effect on the disposition of the case, because of the prospect that a new grand jury, not exposed to the

[11] As we have discussed (pages 9-12, *supra*), under the *Costello* rule, an indictment may not be dismissed unless an error has so profoundly tainted the grand jury process as to render the charging document in effect something other than the "indictment of a Grand Jury" (U.S. Const. Amend. V). Under *Costello*, there may be circumstances in which dismissal is not appropriate even where there *has* been an effect on the grand jury's charging decision. No such issue is presented here, however, since the court of appeals viewed this case as one in which the errors did *not* affect the grand jury's decision to indict (see Pet. App. A18 & n.9, A22; see also *id.* at A39 (dissenting opinion)).

[12] To be sure, the prospect of having to reindict a case – an inconvenient and often time-consuming task – will provide some deterrence when a prosecutor is otherwise deliberately inclined to commit error. Cf. Speedy Trial Act of 1974, 18 U.S.C. 3162(a)(2) (authorizing dismissal of an indictment when a defendant is not brought to trial within specified time limits). Yet, a prosecutor who deliberately engages in misconduct presumably has concluded that such misconduct will benefit his case. The threat of dismissal when the defendant *has* been prejudiced would itself provide a deterrent in that situation. More fundamentally, we believe that the threat of contempt, disciplinary action, or judicial disapproval in a published decision provides a greater deterrent against prosecutorial misconduct without imposing the substantial costs on the public described above.

error, will refuse to indict. Thus, a requirement of prejudice does not, as the Bank of Nova Scotia alleges (Br. 36), render the rules governing grand jury proceedings "dead letters," any more than the harmless error rule makes "dead letters" of the rules of evidence and procedure that are designed to ensure a fair trial.

Finally, petitioners have not offered a workable test for determining *when* a court should dismiss an indictment in the absence of prejudice. For example, would one deliberate error count for more than a large number of negligent errors? Would dismissal *ever* be appropriate in the absence of bad motive? Cf. Kilpatrick Br. 11 (noting that even unintentional misconduct threatens the grand jury's integrity). Should a court be less willing to dismiss an indictment stemming from a lengthy investigation? Would dismissal ever be appropriate when an error is not a recurrent one in a particular jurisdiction? Should constitutional errors weigh more heavily than violations of rules of procedure? Would the extent of the prosecutor's prior experience in conducting grand jury investigations be relevant? In addition, questions would no doubt arise as to whether dismissal in the absence of prejudice would be appropriate *during* trial but before the jury has rendered its verdict. These difficult questions underscore the prospect of endless litigation – and widely varying standards among jurisdictions – if this Court were to sanction dismissals of indictments in the absence of prejudice.

II. DISMISSAL OF THE INDICTMENT WOULD BE INAPPROPRIATE IN THIS CASE EVEN IF AN INDICTMENT MAY BE DISMISSED WITHOUT A SHOWING OF PREJUDICE

A. Even if dismissal of an indictment in the absence of prejudice were appropriate in some class of cases, dismissal would be inappropriate in this case.

The Second Circuit, which is the only circuit that has ever dismissed an indictment in the absence of prejudice,

has stated that dismissal is appropriate only when "the course of official misconduct is a demonstrated, long-standing one," *i.e.*, when "the pattern of misconduct is widespread or continuous." *United States* v. *Fields*, 592 F.2d 638, 648 (2d Cir. 1978), cert. denied, 442 U.S. 917 (1979); accord, *e.g.*, *United States* v. *Brown*, 602 F.2d 1073, 1076-1077 (2d Cir.), cert. denied, 444 U.S. 952 (1979).

In the present case, there is no claim that the conduct at issue has been widespead in the District of Colorado (or in any other district). The district judges never suggested that any of the conduct that the court of appeals found to be improper had arisen regularly in other cases or involved persons other than the prosecutors who conducted the investigation in this case. To the contrary, Judge Winner went out of his way to point out that "I have had my fair share of experience in dealing with Tax Division lawyers for whose ability and ethics I have the highest regard" (Pet. App. D10). He expressed similar high regard for the United States Attorney's Office in Denver (see *id.* at D1, D2). And petitioners have likewise made clear that they are not alleging any widespread abuse extending beyond this case. As Judge Winner noted (*id.* at D2), "[d]efense counsel carefully point out that neither they nor their clients complain about anything other than acts of the IRS and Department of Justice Tax Division lawyers who ran the grand jury and tried the [obstruction of justice] case." Thus, even under the standard applied in the Second Circuit, dismissal would not be appropriate here.

A second possible standard for dismissing indictments in the absence of prejudice is the one proposed by amici (NACDL Br. 26; ACLU Br. 15): to dismiss if the error was more than an inadvertent or isolated occurrence. Even under that standard, which has not been applied by any court of appeals,[13] dismissal would not be required here.

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[13] The test advocated by amici was proposed by the Third Circuit in *United States* v. *Serubo*, 604 F.2d 807, 817 (1979). The Third Circuit,

The record in this case reveals that the alleged errors were isolated instances in a 20-month investigation that involved dozens of witnesses and thousands of documents. It would be unreasonable to expect that no errors would be uncovered following such a lengthy investigation, particularly when thousands of pages of grand jury materials were made available to the defense for line-by-line scrutiny.[14] See generally *Van Arsdall*, 475 U.S. at 681 (noting the "virtually inevitable presence of immaterial error" in a criminal trial and stating that a defendant is entitled "to a fair trial, not a perfect one"). The record in the present case reveals that, on the whole, the investigation was conducted fairly and professionally. The transcripts of the prosecutors' statements to the grand jury throughout the 20-month investigation demonstrate that the prosecutors undertook to ensure that any indictment returned would be the result of a fair and independent grand jury investigation (see generally Pet. App. A27-A28 n.20 (citing examples)). For instance, the prosecutors repeatedly admonished the grand jury that an indictment should not be returned unless the grand jurors were convinced that the targets of the investigation had willfully violated the law (J.A. 95-97, 165, 167-169, 176, 181). On several occasions, the prosecutors stated that they were advocates and that the grand jurors should evaluate their remarks in that light (J.A. 116, 177, 191-192). In addition, the prosecutors explained that the grand jurors were the

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however, has never applied that test, as it has never dismissed an indictment in the absence of a showing of prejudice. See *United States* v. *Martino*, 825 F.2d 754, 759-760 (1987).

[14] The Bank of Nova Scotia errs in asserting (Br. 4, 6-7 & n.6) that the prosecutors deliberately tried to conceal misconduct by suppressing certain grand jury transcripts. While some proceedings were apparently overlooked and not transcribed, there is nothing in the record to indicate that the failure was intentional, and the district court made no such finding (see Pet. App. C2-C3).

sole judges of credibility (J.A. 171). Those remarks of the prosecutors—made throughout the investigation—belie the view that the prosecutors were deliberately attempting to usurp the grand jury's independence.

By the same token, the transcripts rebut the district court's assertion (Pet. App. C54) that the grand jury "was converted into little more than a rubber stamp." As the court of appeals noted, "[t]he grand jury transcripts portray an active and questioning grand jury," one that was "familiar with the record," asked "thoughtful[]" questions, and "vigorously questioned the prosecutors" (Pet. App. A27-A28 & n.20 (citing numerous examples)).

In short, while we concede that the prosecutors committed certain nonprejudicial errors, we submit that petitioners are wrong in describing the record in this case as reflecting "[u]nprecedented, deliberate and pervasive governmental misconduct" (Kilpatrick Br. 3). Since the overall conduct of the prosecutors during the investigation was proper, the extreme sanction of dismissal of the indictment would be inappropriate.

B. An analysis of the specific allegations of misconduct made by petitioners further shows that petitioners have greatly exaggerated the seriousness of the alleged misconduct and that dismissal would be inappropriate here. Petitioners cite nine purported violations committed by the prosecutors in this case (see Bank Br. 8-25).[15] In several instances, the "errors" involve conduct that is entirely lawful. In others, there is no evidence to support the district court's findings. And in the remainder of the categories, the errors constitute at most exercises of poor judgment on the part of the prosecutors, rather than deliberate efforts to undermine the integrity of the grand jury.

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[15] For convenience, we will follow the Bank of Nova Scotia's categories in discussing the various alleged errors.

1. *Use of the term "agents of the grand jury"*

During the grand jury investigation, one of the prosecutors administered an oath to certain IRS agents who appeared before the grand jury and referred to them as "agents of the grand jury" (see, *e.g.*, J.A. 91). The court of appeals did not decide whether the use of that term was error; rather, it held that petitioners had not suffered any prejudice from its use (Pet. App. A26). In our view, the designation of the agents as "agents of the grand jury" was not error at all. In any event, it is surely not the kind of egregious misconduct that would warrant dismissal of an indictment.

The term "agents of the grand jury" was not created by the prosecutors; that term has been used by this Court and numerous other courts.[16] In *United States* v. *Jones*, 766 F.2d 994, 1001, cert. denied, 474 U.S. 1006 (1985), the Sixth Circuit specifically rejected the view of the district court in this case and held that the swearing of a government agent as an "agent of the grand jury" was not prosecutorial misconduct and did not warrant dismissal of an indictment. The court stated that it was "not persuaded * * * that use of the word 'agent' in connection with government personnel assisting a grand jury will undermine the foundation of public trust and confidence in the system" (*ibid.*). See also *United States* v. *Stanford*, 589 F.2d 285, 292 (7th Cir. 1978) (expressing approval of the grand jury's taking "precautions to preserve secrecy * * * by swearing the FBI personnel as agents and cautioning them about the need for secrecy"), cert. denied, 440 U.S.

[16] See, *e.g.*, *United States* v. *Mara*, 410 U.S. 19, 20 (1973); *id.* at 24 (Douglas, J., dissenting); *In re Grand Jury Proceedings (Mills)*, 686 F.2d 135, 136 (3d Cir.), cert. denied, 459 U.S. 1020 (1982); *In re Perlin*, 589 F.2d 260, 262 (7th Cir. 1978); see also *United States* v. *Cosby*, 601 F.2d 754, 757-758 n.6 (5th Cir. 1979); *In re Atterbury*, 323 F.2d 726 (6th Cir. 1963); but cf. *United States* v. *Claiborne*, 765 F.2d 784, 794-796 (9th Cir. 1985), cert. denied, 475 U.S. 1120 (1986).

983 (1979).[17] The term "agent of the grand jury" was a reasonable shorthand way to refer to the agents' proper role in the investigation, in which they served as "government personnel * * * deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law." Rule 6(e)(3)(A)(ii); see also Pet. App. A25-A26; *United States* v. *Sells Engineering, Inc.*, 463 U.S. 418, 430 & n.13 (1983).

The prosecutors did not attempt to mislead the grand jury by referring to the IRS agents as "agents of the grand jury." In particular, they did not urge the grand jurors to treat the agents as somehow more reliable because they were serving as the grand jurors' agents. Indeed, it is significant that, on numerous occasions, the prosecutor referred to the agents as "my agent(s)" (see, *e.g.*, J.A. 96, 98, 99, 108, 110, 113, 114, 115, 117, 137, 153, 163, 165, 171, 176). Similarly, contrary to the Bank of Nova Scotia's contention (Br. 12), the record reveals that the grand jury understood that the agents were aligned with the prosecutors and that their testimony could not be accepted without assessment of their governmental bias. For instance, during discussions with the prosecutors, grand jurors referred to the agents as "your guys" or "your agents" (see J.A. 117, 157).[18] For these reasons, the use of

[17] Moreover, the prosecutor who administered the oath to the agents testified at the hearing that in Atlanta, Georgia, where he had had prior experience, government agents had been sworn and referred to as agents of the grand jury (J.A. 45-46). He also testified that he was aware that the practice was followed in the Southern District of Florida (J.A. 46). The prosecutor admitted that he was not authorized to administer an oath (J.A. 57; Pet. App. C4). The real issue, however, is not that technical error but the propriety of the designation "agents of the grand jury" and the role played by the agents.

[18] Similarly, there is no evidence that the agents attempted to make use of their designation in performing their duties. The agents testified at the hearing that, to their recollection, they never used the term

the term "agent of the grand jury," even if it was technically inaccurate, was not the type of conduct that warrants dismissal in the absence of prejudice.

2. *Presentation of summaries of evidence*

The district court found that the government presented inaccurate and misleading summaries of evidence to the grand jury (Pet. App. C25-C31). The court of appeals approved the use of summaries in general, especially in complex cases (*id.* at A21). The court, however, found it unnecessary to decide whether the summaries were accurate, since the court concluded that any error on that score resulted in no prejudice to the defendants (*id.* at A28-A29). At bottom, the challenge to the accuracy of the summaries is indistinguishable from the argument that unreliable or incompetent evidence was presented to the grand jury, a claim that this Court has held not to be a valid basis for dismissing an indictment. See *Calandra*, 414 U.S. at 344-345 (validity of an indictment "is not affected by the character of the evidence considered"); *Costello*, 350 U.S. at 364 (defendants may not challenge indictments "on the ground that they are not supported by adequate or competent evidence").

Although the court of appeals did not expressly reject the district court's findings as to the accuracy of the summaries, the court rejected the argument that the Bank of Nova Scotia makes in this Court—that the government's handling of the summaries deprived the grand jury of its ability to make an independent determination of probable cause with respect to the Bank. See Pet. App. A28-A29.

"agent of the grand jury" when interviewing witnesses (J.A. 29, 31, 35). On a related point, the district court was plainly wrong in finding (Pet. App. C8) that the agents convened grand jury sessions. The court of appeals, in rejecting that finding, stated that it was "unable to find an instance in the record [where] the IRS agents convened the grand jury sessions without Government attorneys being present" (*id.* at A23 n.14).

We submit that the record supports that finding by the court of appeals, and fails to support the district court's finding that the summaries were inaccurate and were presented in a misleading fashion.

The summaries in dispute relate primarily to testimony by IRS Agent Richard Mendrop on September 29, 1982, the day before the indictment was returned, regarding the evidence against the Bank of Nova Scotia. The district court found that the government misled the grand jury into believing that the summaries were based solely on prior testimony before the grand jury rather than on other information obtained by Mendrop during his investigation (Pet. App. C26).

In fact, Mendrop never testified that he was just summarizing prior testimony, and the prosecutor never said that he was. The district court's conclusion was based in large part on the following statement by a prosecutor shortly before Mendrop appeared (J.A. 176): "I will put my agents up here to summarize, just walk through, one more time, and refresh your memory." See also J.A. 161. But the prosecutor, in making that remark, did not state that Mendrop would be summarizing only testimony previously heard by the grand jury. And Mendrop himself made it clear that he was discussing not only evidence previously presented to the grand jury but also evidence he had obtained in assisting the prosecutor in conducting the grand jury investigation. Thus, at the beginning of the testimony at issue, Mendrop informed the grand jury that he had "analyzed the evidence which [he had] gathered" and that he would "summarize the evidence" for the grand jury (J.A. 181). Later, in discussing information that he had obtained, Mendrop referred to a "statement" (as opposed to "testimony") from a particular person (J.A. 190). Moreover, the grand jury was well aware that some of the information it received during the investigation was based on interviews conducted outside the grand jury's presence (see, *e.g.*, J.A. 113-115, 136-137, 155-156, 158-159; see

also J.A. 163-164). And a grand jury can reasonably be expected to know which witnesses have testified before it and to recall the testimony of such witnesses.

The district court found that Mendrop's summary was "an inaccurate recitation of 'facts' in several significant respects" (Pet. App. C28). Specifically, Mendrop testified that Tom Waters—a former owner of another bank (to which petitioner Kilpatrick owed money)—had stated that he had been introduced to Monte Smith, the manager of the Bank of Nova Scotia's Cayman Islands branch, at Kilpatrick's offices in Denver (J.A. 189-190). The district court found (Pet. App. C28) that this testimony was incorrect because Waters' description of Smith at petitioner Kilpatrick's trial on the obstruction of justice count of the indictment did not seem to fit Smith.

In the first place, the question whether Smith visited Kilpatrick in Denver was not essential to the government's proof of the Bank's criminal conduct. Other evidence pertaining to the Bank was presented both during Mendrop's summary[19] and during other parts of the investigation.[20]

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[19] For instance, Mendrop noted that the Bank permitted Kilpatrick to close a certain account and remove the funds even though Kilpatrick did not have signature authority (G.J. Tr., Mendrop, 9/29/82, 9:32 a.m., at 68-69); that the Bank had knowledge of Kilpatrick's various business entities involved in the tax shelters (*id.* at 70-71); that, in transactions involving purported financing of the tax shelter scheme, the Bank stopped payment on a check and backdated another check (involving about $18 million) under suspicious circumstances (*id.* at 65-66; see Indictment 17); and that the Bank received a legal bill for work performed in examining a tax shelter that the Kilpatrick organization had put together (but did not sell) (J.A. 188).

[20] For instance, testimony of various witnesses demonstrated that the Bank was knowingly involved in a check kiting scheme that was part of the fraud under investigation (J.A. 101-108, 117-119). In addition, exhibits before the grand jury included records of the Bank relating to fraudulent tax shelter transactions (see, *e.g.*, J.A. 172-173). The exhibits showed that the Bank had received a prospectus regarding an investment entity put together by the Kilpatrick organization, and that the Bank therefore had reason to know that Kilpatrick was in the tax shelter business (see Gov't C.A. Br. 29). There was also testimony (J.A. 174-175) relating to the Bank's suspicious backdating and substitution of a check.

In any event, there was no showing that the prosecutors offered evidence that they knew to be false, even on the narrow question of whether Smith had visited Kilpatrick in Denver.[21] In short, petitioners have failed to show that there was any misconduct concerning the summaries, let alone any conduct that was so egregious as to warrant dismissal of the indictment.[22]

3. *Mistreatment of an expert witness*

Both the district court (Pet. App. C33-C34) and the court of appeals (*id.* at A27) criticized the treatment of Roland Hjorth, a tax professor at the University of

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[21] As recounted by Mendrop, Smith's visit was described not only by Waters, but also by Kilpatrick's chauffeur (see J.A. 189). The district court noted that the government had doubts about the accuracy of Waters' statement regarding Smith (Pet. App. C28). In the testimony cited by the district court, however, the prosecutor was referring to doubts that arose several months prior to the indictment; he testified that steps were subsequently taken to resolve those doubts (J.A. 88). In any event, doubts by the government would not necessarily mean that Waters' statement was wrong. And there is no requirement that a prosecutor inform a grand jury any time he is not absolutely certain that a particular piece of evidence is reliable.

[22] Similarly, the district court erred in determining (Pet. App. C30-C31) that a prosecutor mischaracterized the evidence against the Bank when he stated, shortly before Mendrop's summary (J.A. 178-179): " '[A]s my agents will tell you there is evidence that the bank knew it was the IRS—they were in fact told that it was the IRS they were defrauding.' " The evidence (see, *e.g.*, notes 19 and 20, *supra*) provided a reasonable inference that the Bank knew that the IRS was being defrauded, even if it was not "told" that explicitly. Cf. *United States* v. *Nealy*, 729 F.2d 961, 962-963 (4th Cir. 1984). In any event, the prosecutors repeatedly stated during the investigation that they were advocates and that the grand jury should scrutinize their statements as such (see J.A. 116, 177, 191-192).

Washington Law School, by one of the prosecutors.[23] As the court of appeals concluded, that incident did not prejudice petitioners (*id.* at A27). We submit that the prosecutor's actions, while regrettable, do not warrant dismissal of the indictment.

The incident, which occurred during a lunch break while the grand jury was not in session (W. Tr. 491-493), was at worst a debate between two lawyers arising out of a disagreement as to legal theories, in which the prosecutor may have expressed himself too strongly in the heat of the moment (see W. Tr. 496-507 (testimony of Hjorth)). Indeed, in appearing before the grand jury after the incident, Hjorth stated that he appreciated the prosecutor's "prodding" him into thinking things through (G.J. Tr., Hjorth, 7/20/82, 4:05 p.m., at 6). And Hjorth testified at the motions hearing that his grand jury testimony was not affected by the prosecutor's conduct (W. Tr. 481-482). In fact, when the incident occurred, Hjorth had already said all that he intended to say to the grand jury, and he was

[23] Hjorth testified as an expert witness at the request of a target (see Pet. App. D15). The prosecutors called Hjorth to discuss tax law even though they were under no legal duty to do so. Although the law is not entirely settled, several circuits have held that a prosecutor has no duty to present exculpatory evidence to the grand jury. See, *e.g.*, *United States* v. *Mitchell*, 777 F.2d 248, 263 (5th Cir. 1985), cert. denied, 476 U.S. 1184 (1986); *United States* v. *Hawkins*, 765 F.2d 1482, 1488 (11th Cir. 1985), cert. denied, 474 U.S. 1103 (1986); *United States* v. *Sears, Roebuck & Co.*, 719 F.2d 1386, 1394 (9th Cir. 1983), cert. denied, 465 U.S. 1079 (1984). Subsequent to the indictment, the Tenth Circuit held, contrary to several circuits, that a prosecutor is required to present "substantial" exculpatory evidence to the grand jury. See *United States* v. *Page*, 808 F.2d 723, 727-728 (1987) (collecting conflicting authorities), cert. denied, No. 86-6848 (June 8, 1987). It is doubtful that the prosecutors would have been required to present Hjorth's legal theory to the grand jurors, much less call Hjorth as a witness, even under the standard later adopted by the Tenth Circuit. Cf. *United States* v. *Sells Engineering, Inc.*, 463 U.S. 418, 430 (1983) (noting that the prosecutor "advises the [grand] jury on the applicable law").

asked only a few questions when he appeared again before the grand jury later in the day (see W. Tr. 472-473, 491).[24] Finally, although two grand jurors may have heard the conversation (see J.A. 61; W. Tr. 377, 493), the prosecutors later instructed the grand jury (on the day the indictment was returned) to disregard anything they may have heard in conversations between a prosecutor and a witness (J.A. 191).[25]

[24] Contrary to Judge Winner's suggestion, which Judge Kane apparently adopted (see Pet. App. C34), Hjorth did not testify that the prosecutor " 'impl[ied] that the Tax Division of the Department of Justice will take after the witness and will complain to the University of Washington.' " Hjorth testified that during the conversation at issue, the prosecutor stated, "I'll see you in court" (W. Tr. 502). The prosecutor acknowledged that he had made such a statement, but he testified that he did not mean it as a threat to prosecute the witness (J.A. 50). The prosecutor described the statement as "a rather flippant expression meaning * * * I don't think you can support that position anyway, anywhere" (J.A. 63). Hjorth conceded at one point during the hearing that he was not intimidated by the statement and that, in the context of two lawyers debating a legal point, the statement could be characterized as, "I sure as heck don't agree with that and I'll have a judge test this one if you want to keep that concept alive" (W. Tr. 503-504). Hjorth also testified that the prosecutor had called him a discredit to his profession as a law professor for testifying on behalf of one of the targets (W.Tr. 377-378, 496-497). The prosecutor denied making such a statement (J.A. 60), and Hjorth was unable to recall when in the sequence of events the statement was allegedly made (W. Tr. 504-507).

[25] As this Court has indicated with respect to petit jurors, there is an "almost invariable assumption of the law that jurors follow their instructions." *Richardson* v. *Marsh*, No. 85-1433 (Apr. 21, 1987), slip op. 6; accord, *e.g.*, *Greer* v. *Miller*, No. 85-2064 (June 26, 1987), slip op. 9 n.8; see also *United States* v. *Drake*, 494 F.2d 648, 650 (7th Cir. 1974) (possibility that petit jurors may have overheard a witness tell the prosecutor that the defendant's alibi witness was "lying" not reversible error, since there was no direct evidence that any jurors actually heard the remark and the trial court gave a general curative instruction).

4. *Granting informal immunity*

In dismissing the indictment, the district court stated that the prosecutors "ignored entirely the federal immunity statute (18 U.S.C. §§ 6001, *et seq.*) * * * and, instead, secured testimony by engaging extensively in * * * bestowing 'informal immunity' through 'letters of assurance' " (Pet. App. C20). According to the district court, that practice was "not merely damnable * * * [but] clearly illegal" (*id.* at C20 n.13). In reaching that decision, the district judge relied heavily on one of his own decisions, which was later reversed by the Tenth Circuit, *United States* v. *Anderson,* 577 F. Supp. 223, 233 (D. Wyo. 1983) (Kane, J.), rev'd, 778 F.2d 602, 606 (10th Cir. 1985).

The court of appeals rejected the district court's holding that the use of informal immunity was illegal (Pet. App. A22 (citing authority)).[26] The court of appeals' ruling accords with the ruling of every other circuit that has squarely faced the issue. See *United States* v. *Winter,* 663 F.2d 1120, 1133 (1st Cir. 1981) (citing cases), cert. denied, 460 U.S. 1011 (1983); *United States* v. *Librach,* 536 F.2d 1228, 1230 (8th Cir.), cert. denied, 429 U.S. 939 (1976); cf. *United States* v. *Murphy,* 768 F.2d 1518, 1532 (7th Cir. 1985), cert. denied, 475 U.S. 1012 (1986); *United States* v. *Gullett,* 713 F.2d 1203, 1208 (6th Cir. 1983), cert. denied, 464 U.S. 1069 (1984).[27]

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[26] As the court of appeals' treatment of this issue illustrates (see also pages 39-41, 43-46, *infra*), the Bank of Nova Scotia is profoundly wrong in repeatedly asserting that the Tenth Circuit did "not disput[e] the impropriety of the [prosecutors'] conduct" (Br. 27) and that "[t]he misconduct findings of Judge Kane were not disturbed by the majority of the panel of the Court of Appeals" (*id.* at 7); see also *id.* at 4, 26, 32; but see Kilpatrick Br. 40).

[27] The Bank of Nova Scotia attempts to argue that the manner in which informal immunity was used prejudiced petitioners (Br. 17-18), but its argument is in essence just a quarrel with the practice of providing promises of immunity to prospective witnesses in exchange for their cooperation and truthful testimony. The court of appeals found (Pet. App. A22) that the defendants suffered no prejudice based on the use of informal immunity.

5. *Calling witnesses who asserted their privilege against compulsory self-incrimination*

The district court held (Pet. App. C23-C25) that the prosecutors engaged in misconduct by bringing before the grand jury seven witnessess who the prosecutors believed were likely to invoke the Fifth Amendment. That holding was erroneous, and it was properly rejected by the Tenth Circuit (*id.* at A26-A27).

The courts have held that even a target of an investigation may be compelled to appear before a grand jury and, in effect, be tested in front of the grand jurors. See, *e.g.*, *United States* v. *Friedman,* 445 F.2d 1076, 1088 (9th Cir.), cert. denied, 404 U.S. 958 (1971); *United States* v. *Cefalu,* 338 F.2d 582, 584 (7th Cir. 1964). It follows, *a fortiori,* that there is no bar to calling a third party, whose assertion of the privilege would have little likelihood of prejudicing the target.

The rule is no different even when the prosecutor is informed (or otherwise has reason to believe) that a witness intends to invoke the Fifth Amendment. Numerous courts have held that calling a witness before the grand jury under such circumstances is not improper. See, *e.g.*, *United States* v. *Wolfson,* 405 F.2d 779, 784-785 (2d Cir. 1968) (collecting cases), cert. denied, 394 U.S. 946 (1969); *United States* v. *DeSapio,* 299 F. Supp. 436, 440 (S.D.N.Y. 1969); *United States* v. *Zirpolo,* 288 F. Supp. 993, 1007 (D.N.J. 1968); *United States* v. *Leighton,* 265 F. Supp. 27, 36-38 (S.D.N.Y. 1967).

The logic of these cases is apparent. Even if the prosecutors expected that the witnesses would assert the Fifth Amendment, they could not be certain of that until the witnesses actually appeared under oath before the grand jury. Witnesses not infrequently change their strategies when they must actually appear before a grand jury. Moreover, by calling the witnesses, the government was able to make a complete record on the thoroughness of its investigation (see J.A. 65), an issue that sometimes arises

at trial in tax prosecutions. See generally *Holland* v. *United States,* 348 U.S. 121, 135-136 (1954).

If petitioners were correct that prosecutors may not call before the grand jury witnesses who announce an intention to assert their Fifth Amendment privilege, a witness "could automatically gain immunity from Grand Jury subpoena" merely by advising the prosecutor that he intends to invoke the Fifth Amendment; in such a case the witness " 'would denude that ancient body of a substantial right of inquiry' " (*Leighton,* 265 F. Supp. at 38 (citation omitted)).[28]

Finally, as the court of appeals pointed out (Pet. App. A26, A27), the record reveals that the prosecutors ceased their questioning once each witness invoked the Fifth Amendment (see J.A. 139-140, 141-142, 143, 150-151, 153-154, 154-155, 158). And the prosecutors in no way tried to build their case around these assertions of the Fifth Amendment. To the contrary, they took care to prevent prejudice to the defendants by repeatedly advising the

[28] Contrary to the district court's conclusion (Pet. App. C46-C47), there is nothing improper in the fact that four of the witnesses were asked questions concerning payment of their attorneys' fees (see J.A. 139-140, 141-142, 143, 149-150). The grand jury was entitled to know whether one of the targets was paying the attorneys' fees for witnesses who were refusing to testify before the grand jury. Payment of such fees, for example, could constitute an act in furtherance of a conspiracy. See generally *In re Grand Jury Proceedings* (*Pavlick*), 680 F.2d 1026, 1028 (5th Cir. 1982). In addition, "any conduct, the likely effect of which would be to mislead or conceal," is evidence of willfulness in a criminal tax prosecution. *Spies* v. *United States,* 317 U.S. 492, 499 (1943). An attempt by a target to induce witnesses to withhold information from the grand jury would constitute such conduct and would therefore be evidence of intent and guilty knowledge. See generally *Ewing* v. *United States,* 386 F.2d 10, 15 (9th Cir. 1967) (attempt to bribe a witness), cert. denied, 390 U.S. 991 (1968). Furthermore, a corrupt endeavor to cause a witness to assert the Fifth Amendment constitutes obstruction of justice. See, *e.g.*, *United States* v. *Arnold,* 773 F.2d 823, 824 (7th Cir. 1985); *United States* v. *Baker,* 611 F.2d 964 (4th Cir. 1979).

grand jurors that they should not draw any adverse inferences from a witness's invocation of the Fifth Amendment (see, *e.g.*, J.A. 109, 130-131, 131-132, 155, 169-170). That advice was given not only months prior to the time the witnesses asserted the privilege, as acknowledged by the district court (Pet. App. C25), but also virtually contemporaneously with the testimony of two of the witnesses (see J.A. 153-155; see also J.A. 169-170). In short, there is nothing about the brief appearances of the seven witnesses who invoked the Fifth Amendment that would warrant dismissing the indictment. See generally *Namet* v. *United States,* 373 U.S. 179, 186-189 (1963); *Baker* v. *United States,* 389 F.2d 629, 630-633 (7th Cir.), cert. denied, 393 U.S. 875 (1968).

6. *Violations of Rule 6(d)*

We do not dispute that Fed. R. Crim. P. 6(d) was violated by the simultaneous appearances before the grand jury of two IRS agents to read testimony given before the prior grand jury. The violations, however, were only technical ones. The prosecutors did not have any improper motive, and, as the court of appeals found (Pet. App. A18), the joint appearances could not possibly have prejudiced the grand jury.

The joint reading of transcripts began when the agents complained of colds and sore throats and asked the prosecutors whether they could read together to break up the procedure (J.A. 52-53). Previously, only one agent had appeared at a time to read transcripts (see, *e.g.*, J.A. 119). The prosecutors agreed to permit two agents to read transcripts at the same time (one reading the questions and the other reading the answers) (J.A. 54). Thus, the procedure was initiated for an entirely innocent reason, even though it was technically inconsistent with Rule 6(d).

The two special agents who did most of the joint readings—Mendrop and Raybin—were familiar figures who had appeared before the grand jury individually prior to their joint appearances (*e.g.*, G.J. Tr., Mendrop,

8/4/81, 9:25 a.m.; G.J. Tr., Raybin, 9/9/81, 10:02 a.m.). It is not disputed that the agents gave no testimony of their own when they appeared together before the grand jury. And according to the agents' testimony in the hearing before Judge Kane (J.A. 66-67)—which was not contradicted by the transcripts of the grand jury proceedings (see J.A. 53-54)—no questions were asked during the readings. Indeed, the prosecutors took steps to make sure that questioning would not occur. Thus, as the district court noted (Pet. App. C8), the grand jurors were advised not to ask questions when the agents appeared to read transcipts. Instead, they were instructed to jot down any questions they had, so that the prosecutors could answer them later (J.A. 137-138). And the prosecutors instructed the agents not to answer any questions (J.A. 53). The prosecutors also advised the grand jurors that if they were not satisfied with having particular evidence introduced through the transcript, the witness could be called in person (J.A. 138).

The joint reading of transcripts was a purely ministerial function that did not place the agents' credibility at issue. Cf. *United States* v. *Blitz*, 533 F.2d 1329, 1344 (2d Cir.), cert. denied, 429 U.S. 819 (1976). Thus, the technical violation of Rule 6(d) in this case did not implicate the concerns to which the rule is addressed—*i.e.*, to safeguard the secrecy of the grand jury proceedings and to protect the grand jurors from the possibility of undue influence. See *Mechanik*, 475 U.S. at 74 (O'Connor, J., concurring in judgment). Here, grand jury secrecy was not jeopardized; the agents were persons to whom disclosures of grand jury information could properly be made under Rule 6(e)(3)(A)(ii). And there was no danger of undue influence or intimidation of the grand jurors. Unlike in the case of in tandem testimony, where there is a potential for undue influence because each witness may corroborate the other's account and add to the other's credibility, a risk of undue influence is not present when the joint appearance of witnesses involves only the reading of transcripts. And

there is nothing inherently intimidating about two agents reading transcripts to the grand jury.[29] In short, the technical violation of Rule 6(d) in this case does not even remotely warrant dismissal of the indictment.

7. *Alleged use of grand jury to gather information for civil purposes*

The district court found that the record "suggests that information was disclosed to other IRS agents for use in civil cases" (Pet. App. C9). The district court also found that there was a "serious possibility" that the grand jury was "manipulated in order to obtain evidence useful in later civil litigation" (*id.* at C12). The court of appeals rejected those findings, noting the lack of record support for them (*id.* at A23) and pointing out (*id.* at A25 (footnote omitted)) that the grand jury's return of "an extensive indictment is probative evidence that it was not abused to obtain evidence for civil purposes."[30]

The court of appeals correctly rejected the district court's findings. The district court's determination that information may have been disclosed for civil purposes is not only without evidentiary support but is in conflict with prior findings made by the district court itself. Near the end of the hearing, Judge Kane stated (J.A. 89-90), "[A]s I recall the testimony of the I.R.S. special agents, they have emphatically denied turning over grand jury material to

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[29] Indeed, multiple government personnel routinely appear before grand juries. For example, Rule 6(d) provides that government "[a]ttorneys" (emphasis added) may be present in the grand jury, along with "the witness under examination" (who may himself be a government agent). Thus, the presence of more than one government official in the grand jury is not deemed by Rule 6(d) to be coercive per se.

[30] The Bank of Nova Scotia misstates the court of appeals' holding in noting that the court "held that the return of an indictment demonstrates that the grand jury was not abused for *solely* civil purposes" (Bank Br. 21 n.19 (emphasis in original)). The italicized language is *not* part of the court's holding.

the civil branch and I haven't seen any evidence yet that says that that indeed was done." No such evidence was offered at any time after Judge Kane made that observation.

Similarly, the district court's finding of manipulation is based entirely on speculation. In making that finding, the district court cited the fact that the IRS had an interest in the evidence developed (Pet. App. C12-C13), that several investors in the tax shelters were interviewed by government agents but were not called before the grand jury (*id.* at C13), and that the IRS civil personnel performed calculations of the taxes due on some of the investors' tax returns and that those calculations were not presented to the grand jury (*id.* at C13-C14). Those factors do not support the district court's finding of possible manipulation.

Most criminal tax cases involve alleged violations of provisions of the tax laws that, in the absence of willfulness, would still constitute civil violations. Thus, the mere fact that the government performed calculations of tax liability and gathered information that may also have been relevant in a civil action is not enough to permit an inference that the grand jury was manipulated. That is especially true in the present case. As one of the special agents testified (J.A. 29-30), the computations of tax liability had no civil purpose, and those computations were not turned over to anyone at the IRS who had a civil function. And as the court of appeals noted (Pet. App. A24), nothing in Fed. R. Crim. P. 6 prohibited the prosecution from availing itself of the expertise of IRS civil personnel, who performed the computations. See Fed. R. Crim. P. 6(e)(3)(A)(ii); *United States* v. *Sells Engineering, Inc.*, 463 U.S. 418, 428 (1983).[31]

[31] According to the district court (Pet. App. C38), the government acted "in direct contravention" of this Court's decisions in *United States* v. *Sells Engineering, supra* (holding that Justice Department Civil Division attorneys may not obtain grand jury materials for use in civil actions without a court order), and *United States* v. *Baggot*, 463 U.S. 476 (1983) (holding that an IRS civil tax audit is not

Furthermore, the investor interviews were entirely proper as part of a thorough investigation. It is apparent that in a criminal investigation involving a tax shelter, investors can be a source of information on the harm caused to the government by the shelter. Moreover, the interviews were relevant to possible mail fraud charges. At a trial for mail fraud, the testimony of investors as to their reasons for investing in the tax shelters would be relevant to establish the representations that were made to investors and to show that those representations had the potential to defraud the investors. Indeed, during the hearings before the district court, an agent explained the purpose of the investor interviews and indicated their relationship to mail fraud (J.A. 26). In addition, the grand jury transcripts reveal that at least three investors appeared before the grand jury (see G.J. Tr., Long, 12/9/81, 10:04 a.m., at 5-6; G.J. Tr., Henkel, 2/4/82, 12:52 p.m., at 6-7, 9; G.J. Tr., Moffet, 3/2/82, 3:05 p.m., at 4-8).[32] Finally, the 27-count indictment itself confirms that the interviews were conducted for a valid criminal purpose. The indictment names investors whom the defendants assisted in filing false returns and to whom the defendants mailed items (Indictment 48, 55). In short, the court of appeals properly

"preliminarily to or in connection with a judicial proceeding" for purposes of Rule 6(e)(3)(C)(i). The district court's conclusion is factually incorrect, as we have shown. Moreover, it should be noted that *Sells Engineering* and *Baggot* were not decided until *after* the indictment in the present case was returned. And the law was anything but clear prior to those decisions, as Chief Justice Burger's dissenting opinions in those cases demonstrate.

[32] There is, of course, no requirement that every person interviewed by government attorneys or agents be presented to the grand jury. Cf. *United States* v. *Chanen*, 549 F.2d 1306, 1312 (9th Cir.) (noting that "the grand jury generally relies on the prosecutor to determine what witnesses to call" and that the prosecutor "determines what evidence to present before the grand jury"), cert. denied, 434 U.S. 825 (1977). The fact that various investors were interviewed but did not testify before the grand jury does not show that the investors were interviewed for an improper purpose.

rejected the district court's finding that the grand jury had been manipulated for civil purposes.[33]

8. *Disclosure of the identity of targets of the investigation*

During the investigation, the government sent letters to potential witnesses who had had business relationships with the targets of the grand jury investigation, but who were beyond the reach of the grand jury's subpoena power. Those letters identified the targets and the general nature of the investigation. The letters indicated that "[i]t has been determined that your testimony will be helpful in resolving questions which still face the Grand Jury," and they invited the recipients to appear before the grand jury. Pet. App. C15-C16. The district court concluded (*id.* at C15-C17) that the government's disclosure of the identities of targets of the investigation violated Rule 6(e). In our view, that ruling is erroneous and provides no basis for dismissal of the indictment.

The letters in question did not constitute improper disclosures of "matters occurring before the grand jury" (Fed. R. Crim. P. 6(e)(2)); they revealed no more than would typically be revealed to a witness during questioning when he appeared to meet with a prosecutor or to testify before the grand jury. Any blanket prohibition against disclosing to potential witnesses the identity of the targets or the general subject matter of an investigation would make it impossible for the prosecutor to direct a witness's testimony to the matter under investigation or for him to determine whether the witness had any information that was of use to the grand jury. Petitioners have cited no authority—and we know of none—holding that the

[33] There is likewise no merit in the district court's finding (Pet. App. C9) that the prosecutors relinquished to the IRS their responsibility to determine the persons to whom disclosures of grand jury material would be made. As the court of appeals concluded (*id.* at A23), the district court's finding is unsupported by the record.

government, in private letters to, or discussions with, potential witnesses, may not reveal anything about the subject matter of a grand jury investigation. Thus, it was not unreasonable for the prosecutors to believe that such disclosures were a permissible way of obtaining information for the grand jury investigation.[34]

9. *Imposition of secrecy obligations on two witnesses*

In two instances, a prosecutor instructed witnesses, contrary to Fed. R. Crim. P. 6(e), that they should not reveal the fact that they had testified before the grand jury or the contents of their testimony (Pet. App. C18). Both witnesses were attorneys who had previously represented petitioners Kilpatrick and O'Donnell in administrative

[34] Also failing to support dismissal of the indictment is the district court's finding (Pet. App. C9-C12) that disclosure lists required by Rule 6(e) were inaccurate and were not filed promptly. The district court noted, without any citation to the record, that numerous IRS personnel given access to grand jury material were never identified on the lists and "remain unknown even now" (Pet. App. C9). The district court also found (*id.* at C11) that persons involved in a project to prepare a computerized index of grand jury materials were "apparently" omitted from the lists. However, the record does not show that any IRS employee was omitted from the disclosure list. Moreover, an agent had an imprecise recollection at the hearing that three people on the disclosure list were key punch operators involved in the computer project (K. Tr. 76). And we know of no evidence that any key punch operators were actually omitted. As for the promptness of the preparation of the disclosure lists, it is true that the government prepared a "catch-all" disclosure list at the end of the investigation (see Pet. App. A24). But in a 20-month investigation, it was inevitable that some personnel would not have been listed previously. There is no evidence that the prosecutors and agents deliberately delayed the addition of names to the disclosure lists for some improper purpose. On the contrary, an agent testified (J.A. 19) that the U.S. Attorney's Office, which handled the preparation of the lists, was requested to add names to the lists "at or about the time that people were to be involved." Significantly, Judge Winner stated, "I have no fault to find with the paper trail left in this matter insofar as the disclosure requirements are concerned" (Pet. App. D25).

proceedings involving the tax shelters (*id.* at C19). The prosecutor told the grand jury that they were calling the attorneys as witnesses because "[t]he primary focus of our investigation involving the financing is the factual representations made concerning Marlborough Investments Limited, IFDC." The prosecutors explained that they wanted "to know what the lawyers were told by the principals, and what information they relayed to the parties" (*ibid.*). Based on that statement, the district court concluded that the secrecy obligations were imposed for the strategic purpose of "prevent[ing] defendants from determining the nature and extent of any such communication that might have been revealed and to foreclose a challenge to such testimony based upon an applicable privilege" (*ibid.*). That conclusion is groundless.

During the hearing before Judge Kane, the prosecutor acknowledged that he had made a mistake when he attempted to impose a secrecy obligation on the witnesses, but that he had done so because of his concern over grand jury leaks (J.A. 72-75).[35] The prosecutor also testified that he had conducted only one grand jury investigation prior to the instant investigation (J.A. 87). He further testified that, at the time he examined the two attorneys, while he was familiar with Rule 6(e)(2), he was not focusing on the provision of that rule that has been interpreted as prohibiting the imposition of secrecy obligations on witnesses (J.A. 73, 77-78).

Statements of the prosecutor before the grand jury show that the prosecutor was seeking only unprivileged materials and information from the targets' attorneys, as to which the privilege had already been waived (J.A. 125-126, 128-129).[36] Neither the court nor petitioners have

[35] Earlier, there had been allegations by Kilpatrick's attorney that someone had approached Kilpatrick and attempted to sell him grand jury information (J.A. 73, 75).

[36] The fact that the prosecutor expressed interest in communications between the attorney witnesses and their clients does not by itself indicate that he was seeking privileged information, since not every communication between a lawyer and his client is privileged. See, *e.g.*, *United States* v. *Jones*, 696 F.2d 1069, 1072-1073 (4th Cir. 1982); *In re Sealed Case*, 676 F.2d 793, 808-809 (D.C. Cir. 1982); *United States* v. *Bump*, 605 F.2d 548, 550-551 (10th Cir. 1979); B. Gershman, *Prosecutorial Misconduct* § 2.4(d), at 2-22 to 2-23 (1987); cf. *United States* v. *Wolfson*, 558 F.2d 59, 66 (2d Cir. 1977) (noting that the "ordinary presumption [is] that a lawyer is competent to protect his client's confidential interests before the grand jury").

cited anything in the grand jury testimony of the two witnesses (or in any other part of the record) to indicate that the prosecutor attempted to pressure either witness into violating the attorney-client privilege.

Finally, it does not appear that the prosecutors had anything to gain by imposing the secrecy obligations. If the two attorneys had voluntarily disclosed privileged communications before the grand jury, those communications could not have been suppressed at the grand jury stage, even if petitioners had learned about the testimony immediately after it occurred. Cf. *United States* v. *Calandra, supra; Lawn* v. *United States, supra; United States* v. *Rogers*, 751 F.2d 1074, 1079 (9th Cir. 1985). More fundamentally, a secrecy obligation that takes effect *after* a witness has testified in the grand jury could not have the effect of inducing the witness to breach the attorney-client privilege (or preventing the client from stopping such a breach).[37]

* * * * *

[37] In addition to the nine grounds discussed above, petitioners cite additional alleged misconduct that warrants only brief response. First, they claim (Bank Br. 29; Kilpatrick Br. 41) that one of the prosecutors violated this Court's decision in *Massiah* v. *United States*, 377 U.S. 201 (1964), by interviewing employees of the Bank of Nova Scotia, without counsel for the Bank being present, after the issuance of the indictment. As the court of appeals (Pet. App. A22) and Judge Kane (*id.* at C49) recognized, that incident obviously could not have affected the grand jury's charging decision, since it occurred after the indictment was returned. Moreover, the prosecutor involved, who was

In sum, we submit that there is no legal or policy basis for dismissing an indictment in the absence of prejudice. But even if it were proper in some circumstances for a court to do so, that drastic step would not be appropriate here. For the most part, the present investigation was handled in a professional manner, and the record reflects that the grand jury was independent and active. Much of the alleged misconduct found by the district court was entirely lawful. The rest of the acts were isolated incidents limited to this case. Thus, even if petitioners were not required to demonstrate prejudice, the alleged errors, taken together, would not warrant the drastic remedy of dismissal of the indictment in this 20-month investigation.

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not one of the prosecutors who conducted the grand jury investigation, had only a limited role in the case prior to the return of the indictment (J.A. 36; K. Tr. 1095-1096). In any event, the conduct does not appear to have been improper. Since a corporation is a distinct entity from its stockholders, officers, and employees, the prosecutor could reasonably conclude that there was no Sixth Amendment principle that barred him from interviewing an unindicted employee of the Bank without first contacting the Bank's counsel.

In addition, the Bank of Nova Scotia refers to a statement purportedly made by a prosecutor that even if the target was not guilty, the government would "break" him with the cost of the defense (Bank Br. 3). The prosecutor strongly denied making that statement (Pet. App. C14), and both Judge Kane and Judge Winner declined to resolve the question whether the witness who attributed the statement to the prosecutor was telling the truth (see Pet. App. C14, D14-D15).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

STATUTE AND RULES INVOLVED

Section 2111 of 28 U.S.C. provides:

Harmless error

On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

Rule 6, Federal Rules of Criminal Procedure, provides in relevant part:

The Grand Jury

* * * * *

(d) Who May Be Present. Attorneys for the government, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer or operator of a recording device may be present while the grand jury is in session, but no person other than the jurors may be present while the grand jury is deliberating or voting.

(e) Recording and Disclosure of Proceedings.

(1) Recording of Proceedings. All proceedings, except when the grand jury is deliberating or voting, shall be recorded stenographically or by an elecronic recording device. An unintentional failure of any recording to reproduce all or any portion of a proceeding shall not affect the validity of the prosecution. The recording or reporter's notes or any transcript prepared therefrom shall remain in the custody or control of the attorney for the government unless otherwise ordered by the court in a particular case.

(2) General Rule of Secrecy. A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court.

(3) Exceptions.

(A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to–

(i) an attorney for the government for use in the performance of such attorney's duty; and

(ii) such government personnel (including personnel of a state or subdivision of a state) as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law.

(B) Any person to whom matters are disclosed under subparagraph (A)(ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce federal criminal law. An attorney for the government shall promptly provide the district court, before which was impaneled the grand jury whose material has been so disclosed, with the names of the persons to whom such disclosure has been made, and shall certify that the attorney has advised such persons of their obligation of secrecy under this rule.

(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made–

(i) when so directed by a court preliminarily to or in connection with a judicial proceeding;

(ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury;

(iii) when the disclosure is made by an attorney for the government to another federal grand jury; or

(iv) when permitted by a court at the request of an attorney for the government, upon a showing that such matters may disclose a violation of state criminal law, to an appropriate official of a state or subdivision of a state for the purpose of enforcing such law.

If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made in such manner, at such time, and under such conditions as the court may direct.

(D) A petition for disclosure pursuant to subdivision (e)(3)(C)(i) shall be filed in the district where the grand jury convened. Unless the hearing is ex parte, which it may be when the petitioner is the government, the petitioner shall serve written notice of the petition upon (i) the attorney for the government, (ii) the parties to the judicial proceeding if disclosure is sought in connection with such a proceeding, and (iii) such other persons as the court may direct. The court shall afford those persons a reasonable opportunity to appear and be heard.

(E) If the judicial proceeding giving rise to the petition is in a federal district court in another district, the court shall transfer the matter to that court unless it can reasonably obtain sufficient knowledge of the proceeding to determine whether disclosure is proper. The court shall order

transmitted to the court to which the matter is transferred the material sought to be disclosed, if feasible, and a written evaluation of the need for continued grand jury secrecy. The court to which the matter is transferred shall afford the aforementioned persons a reasonable opportunity to appear and be heard.

(4) Sealed Indictments. The federal magistrate to whom an indictment is returned may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial. Thereupon the clerk shall seal the indictment and no person shall disclose the return of the indictment except when necessary for the issuance and execution of a warrant or summons.

(5) Closed Hearing. Subject to any right to an open hearing in contempt proceedings, the court shall order a hearing on matters affecting a grand jury proceeding to be closed to the extent necessary to prevent disclosure of matters occurring before a grand jury.

(6) Sealed Records. Records, orders and subpoenas relating to grand jury proceedings shall be kept under seal to the extent and for such time as is necessary to prevent disclosure of matters occurring before a grand jury.

* * * * *

Rule 52, Federal Rules of Criminal Procedure, provides in relevant part:

Harmless Error and Plain Error

(a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

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